IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33000

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 464**
	)	
Plaintiff-Respondent,	)	**Filed: May 13, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
CHRISTOPHER RAY SCHULTZ,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia County. Hon. Monte B. Carlson, District Judge.

Judgment of conviction and unified life sentence with fifteen years determinate for robbery, and unified thirty-year sentence with fifteen years determinate for attempted rape, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Christopher Ray Schultz appeals his convictions and sentences for robbery and attempted rape with a sentence enhancement for use of a deadly weapon. He contends that the State breached a plea agreement and that the district court imposed excessive sentences.

I.
FACTUAL & PROCEDURAL BACKGROUND

Armed with a knife, seventeen-year-old Schultz invaded the home of a woman who lived in the apartment below Schultz's estranged wife's residence. He had planned in advance to invade the home once the victim's husband left, with the intent of raping her. Once inside, he held the knife to the victim's throat and demanded money. He also demanded that she show him her breasts. The victim was able to flee and alert the police, who arrested Schultz a short time later. Schultz was charged with aggravated battery, Idaho Code §§ 18-903(a), -907(b); burglary,

I.C. § 18-1401; robbery, I.C. §§ 18-6501, -6502; attempted rape, I.C. §§ 18-6101, -306; and four sentence enhancements were alleged for using a deadly weapon in the commission of those crimes, I.C. § 19-2520.

Because Schultz was a minor when he committed these crimes, he initially appeared in juvenile court. At that proceeding, defense counsel said:

> [I]n talking with Christopher and previously talking with [the prosecutor], [the prosecutor] agreed that upon waiver [to adult court] and if Christopher ultimately ends up entering a guilty plea to at least some of the charges, the State would make a recommendation to the district court judge of a sentence not to exceed--and certainly it could be less than this depending on negotiations, but not to exceed a 5 year minimum and a 20 year top on the sentence.

Schultz agreed to be waived into adult court at that hearing. Twelve weeks later, however, when Schultz pleaded guilty to robbery, attempted rape, and the deadly weapon enhancement relating to the rape, the prosecutor expressed the plea agreement as calling for the State to "recommend a sentence of 20 years fixed, and then it's free to recommend up to the maximum for an indeterminate period of time. And I guess another way of saying that is that the state can recommend up to 20 to life in this case." Defense counsel agreed that these were the terms and clarified that "the defendant will be free to recommend whatever sentence he feels is appropriate at the time of sentencing. This is certainly not a stipulated sentence." Counsel also noted that the State had agreed not to charge Schultz with attempted murder. The Court restated that the State could recommend a sentence of twenty years to life, and Schultz indicated that this was his understanding of the plea agreement. The State made this sentencing recommendation. The district court imposed a unified life sentence with fifteen years determinate for robbery; and a unified thirty-year sentence with fifteen years determinate for attempted rape with the weapons enhancement. The district court ordered that the sentences run concurrently. Schultz now appeals, contending that the State breached the plea agreement and that the district court imposed excessive sentences.

II.
DISCUSSION/ANALYSIS

A. The Record is Insufficient for Appellate Review of the Alleged Breach of the Plea Agreement

Schultz argues that by recommending a sentence in excess of twenty years in contravention of the agreement put on the record in the hearing on waiver to adult court, the

State breached that agreement. In that waiver hearing conducted in juvenile court, defense counsel indicated that in exchange for Schultz's waiver into adult court, the State agreed to recommend a determinate term of not more than five years and an indeterminate term not exceeding twenty years in the event that Schultz ultimately pleaded guilty. At the change of plea hearing twelve weeks later, however, the defendant himself agreed that the State could recommend a sentence of twenty years to life. Schultz made no objection to the State's ultimate recommendation below, nor did he file a motion to withdraw his plea.

The fact that Schultz did not object to the prosecutor's sentencing recommendation or otherwise claim a prosecutorial breach of the plea agreement in the trial court does not, in itself, preclude consideration of the issue on appeal. It is generally true that if a party does not raise an issue before the trial court, that issue is waived for purposes of appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Nevertheless, because a breach of a plea agreement is fundamental error, a claim of such a breach may be considered for the first time on appeal if the record provided is sufficient for that purpose. *State v. Wills*, 140 Idaho 773, 775, 102 P.3d 380, 382 (Ct. App. 2004); *State v. Jones*, 139 Idaho 299, 301, 77 P.3d 988, 990 (Ct. App. 2003); *State v. Brooke*, 134 Idaho 807, 809, 10 P.3d 756, 758 (Ct. App. 2000); *State v. Kellis*, 129 Idaho 730, 734, 932 P.2d 358, 362 (Ct. App. 1997). An appellate court can know only what is revealed on the record and it is therefore incumbent upon the respective attorneys to clearly and unambiguously state the entire plea agreement on the record. *State v. Allen*, 143 Idaho 267, 271, 141 P.3d 1136, 1140 (Ct. App. 2006). We have said that when a prosecutorial promise is disputed and the record on appeal does not clearly disclose the terms of the plea agreement, appellate review is not possible. *See Kellis*, 129 Idaho at 734, 932 P.2d at 362; *State v. Rutherford*, 107 Idaho 910, 914, 693 P.2d 1112, 1116 (Ct. App. 1985).

In this case, the transcript of the trial court proceedings presents two clear and unequivocal, but entirely contradictory, agreements pertaining to the sentence recommendation that the State would make if Schultz pleaded guilty. Nothing in the record explains or reconciles this disparity. It may be, as the State argues, that the first agreement was abandoned or deemed never to have been activated because Schultz did not plead guilty immediately thereafter, but the record does not disclose that. As we said in *State v. Lenon*, 143 Idaho 415, 418, 146 P.3d 681, 684 (Ct. App. 2005), "although claims of breach of a plea agreement may be heard initially on appeal with a less-than-fully-developed record, there is a preference for a complete record

developed in the trial court." Here, the ambiguity in the record could have been resolved if Schultz had filed a motion in the trial court seeking relief for the State's alleged breach of agreement. On the existing record the ambiguity is such that we decline to address Schultz's claim of prosecutorial breach. The claim is preserved without prejudice to Schultz's opportunity to pursue the matter through appropriate proceedings in the trial court should he wish to do so.

B. Sentence Review

Schultz also contends that the sentence imposed in this case was excessive, particularly in light of his youth, his level of intelligence, his first-time felony offender status, and his family support. Sentencing is a matter for the trial court's discretion. When a sentence is challenged on appeal, we examine the record, focusing upon the nature of the offense and the character of the offender, to determine if there has been an abuse of the sentencing court's discretion. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). The defendant bears the burden to show that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). An abuse of discretion will be found only if, in light of the governing criteria, the sentence is excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993). Where reasonable minds might differ as to the length of the sentence, we will not substitute our view for that of the district court. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *State v. Admyers*, 122 Idaho 107, 108, 831 P.2d 949, 950 (Ct. App. 1992). Applying these standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion. Therefore, Schultz's judgment of conviction and sentence are affirmed.

III.
CONCLUSION

The record is insufficient for appellate review of Schultz's contention that the State breached the plea agreement. We affirm the sentence imposed by the district court.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**